UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 100

Docket No. DA-0752-12-0306-I-1

Robert E. Davis,

Appellant,

v.

United States Postal Service,

Agency.

December 31, 2013

Allen Tea, Tomball, Texas, Hilario Garcia and Kyle D. Powell, Houston, Texas, for the appellant.

Garth T. Wright, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision, which sustained the appellant's removal. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The preference eligible appellant was a Maintenance Mechanic for the agency, which also employed his wife at a different duty station. Initial Appeal

File (IAF), Tab 1 at 2; Tab 14, Subtab P. The agency proposed to remove the appellant based on a single charge of unacceptable conduct in violation of the agency's zero tolerance policy and other rules and regulations.[1] IAF, Tab 14, Subtab I at 1-2. The agency specifically charged that the appellant went to his wife's duty station and made threatening remarks to the station manager and staff during a verbal altercation in the station manager's office. *Id*. The incident leading to the appellant's removal took place on the day that his wife called him on the telephone crying because of how her manager had spoken to her. IAF, Tab 4 at 35-36 of 87.

¶3 During the incident, which three supervisors witnessed, the appellant allegedly entered the station manager's office, refused to sit down, and "invaded [the manager's] personal space by moving towards his desk." IAF, Tab 14, Subtab I at 1; *see* IAF, Tab 4 at 65-74 of 87. The appellant also allegedly yelled angrily at the manager. IAF, Tab 14, Subtab I at 1. He yelled, among other things, "that [the manager] wasn't a man, that he had 'no [expletive],' and how his 'punk [expletive] could not talk to him like he talked to women.'" *Id*. The appellant allegedly told the manager not to tell the appellant's wife anything or he would return. *Id*. at 2. The appellant also allegedly threatened that "it wouldn't be pretty," if he had to return to the station. *Id*. at 1. After the manager instructed a supervisor to call the Postal Police, the appellant allegedly stated, "I don't give a [expletive] who you call! I had to leave work to deal with this bull[expletive]!" *Id*. The agency alleged that the appellant's actions were threatening and made the employees in the room fearful. *Id*. at 1-2.

---

[1] The agency's zero tolerance policy states, in pertinent part, that vulgar language "and any form or manner of threatening or provoking remarks or gestures in the workplace is prohibited and unacceptable." IAF, Tab 14 at H. The policy also states that any violation is a serious offense "that will be subject to discipline, including removal." *Id*.

¶4 The appellant appealed the merits of his removal and asserted claims of disparate penalty and disparate treatment based on his sex. IAF, Tab 1; Tab 14 at 3-6. Following a hearing, the administrative judge affirmed the agency's action. IAF, Tab 19, Initial Decision (ID) at 1, 18. The administrative judge found, among other things, that the appellant admitted to telling his wife's station manager "that's how people get their [expletive] kicked," and that he "had no [expletive]," which constituted unacceptable conduct. ID at 11. She therefore sustained the charge of unacceptable conduct. ID at 12. The administrative judge also found that the appellant failed to prove his affirmative defense of sex discrimination; that there was a nexus between the appellant's serious misconduct and the efficiency of the service; and that the penalty of removal was within the tolerable limits of reasonableness. ID at 14-17. In reaching her decision, the administrative judge also found that the comparators identified by the appellant were not similarly-situated employees and that the deciding official considered the relevant *Douglas* factors in making his penalty determination. *Id*. The appellant filed a petition for review arguing, *inter alia,* that the penalty imposed by the agency was too severe and that the administrative judge's disparate penalty analysis was flawed. Petition for Review (PFR) File, Tab 2. The agency filed a response in opposition to the appellant's petition for review. PFR File, Tab 4.

ANALYSIS

¶5 The administrative judge's findings with respect to the charges, nexus, and the appellant's affirmative defense of sex discrimination are supported by the record, and we therefore AFFIRM them. ID at 15, 17. We have considered the appellant's arguments on review concerning the credibility of witnesses, but we discern no reason to reweigh the evidence or substitute our assessment of the record evidence for that of the administrative judge on this issue. *See* PFR File, Tab 2 at 2-3; *Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 105-06 (1997) (finding no reason to disturb the administrative judge's findings when the

administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (same). The only remaining issue before the Board is the administrative judge's findings and determinations concerning the penalty.

¶6 Where, as here, all of the agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100, ¶ 7 (2010); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. *Id.* The Board recognizes that its function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness. *Id.* Thus, the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness. *Woebcke*, 114 M.S.P.R. 100, ¶ 7. However, if the deciding official failed to appropriately consider the relevant factors, the Board need not defer to the agency's penalty determination. *Id.*

¶7 The Board has articulated factors to be considered in determining the propriety of a penalty, such as the nature and seriousness of the offense, the employee's past disciplinary record, the supervisor's confidence in the employee's ability to perform his assigned duties, the consistency of the penalty with the agency's table of penalties, and the consistency of the penalty with those imposed on other employees for the same or similar offenses. *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 5 (2010); *Douglas*,

5 M.S.P.R. at 305-06. Not all of the factors will be pertinent in every instance, and so the relevant factors must be balanced in each case to arrive at the appropriate penalty. *Douglas*, 5 M.S.P.R. at 306. The seriousness of the appellant's offense is always one of the most important factors in assessing the reasonableness of an agency's penalty determination. *Schoemer v. Department of the Army*, 81 M.S.P.R. 363, ¶ 12 (1999).

¶8 The appellant has raised a claim of disparate penalties. In *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640 (2012), the Board clarified the criteria necessary for showing disparate penalties. Specifically, the Board held that an appellant must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but the Board will not have hard and fast rules regarding the 'outcome determinative' nature of these factors." *Id.*, ¶ 20 (quoting *Lewis*, 113 M.S.P.R. 657, ¶ 15). The agency's burden to prove a legitimate reason for the difference in treatment between employees is triggered by the appellant's initial showing that there is enough similarity between both the nature of the conduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently. *Boucher*, 118 M.S.P.R. 640, ¶ 24. The Board's disparate penalty analysis must be based on a fully-developed record. *Williams v. Social Security Administration*, 586 F.3d 1365 (Fed. Cir. 2009).

¶9 In his petition for review, the appellant reasserts his argument that both his wife and a Manager of Maintenance Operations (Maintenance Manager) were similarly-situated employees who were charged with similar misconduct and treated more favorably by the agency than he was.[2] PFR File, Tab 2 at 2, 4-6.

[2] On appeal below, the appellant claimed that there was a third alleged comparator. IAF, Tab 14, Subtab A at 3. However, on review, the appellant did not reassert his argument regarding this alleged comparator for disparate penalty purposes.

The appellant further argues, among other things, that the administrative judge's penalty analysis was inconsistent with the Board's decision in *Boucher*. ID at 4-5. The appellant submitted the decision letters of the alleged comparators on appeal, both of whom received Letters of Warning as the penalty for their unacceptable conduct. IAF, Tab 14, Subtabs N, P-Q.

¶10 The appellant's wife, who was a carrier at another duty station, received a Letter of Warning for her unacceptable behavior in violation of the agency's zero tolerance policy. IAF, Tab 14, Subtab Q. The agency originally imposed a 14-day, no-time-off suspension, but it reduced the penalty through the grievance process to a Letter of Warning. *Id*., Subtabs P-Q. The Board has held that if another employee receives a lesser penalty, despite apparent similarities in circumstances, as the result of a settlement agreement, the agency is not required to explain the difference in treatment. *See Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶ 20 n.4 (2013). Moreover, whether the appellant's wife is considered to have received a 14-day no-time-off suspension or a Letter of Warning, we find that the appellant and his wife were not similarly situated for disparate penalty purposes. The appellant's wife was charged with making statements that led to the appellant's misconduct, IAF, Tab 14, Subtab P, but the appellant drove to his wife's workplace and confronted her supervisor with threatening statements and vulgarity, *id*., Subtab I. Based on the severity of the appellant's misconduct, compared with that of his wife, we find that the appellant failed to show "enough similarity between both the nature of the misconduct and other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently." *Lewis*, 113 M.S.P.R. 657, ¶ 15.

¶11 The agency charged the Maintenance Manager with unacceptable conduct for his unprofessional behavior, which included harassment, coercion, and intimidation through verbal assault. IAF, Tab 14, Subtab O at 2. Following an investigation, the agency issued a Letter of Warning to the Maintenance Manager, in June 2010, for his unacceptable conduct that included but was not limited to an

incident in which he called a mail handler a [expletive]. *Id.*, Subtab N at 1-2. In the Letter of Warning, the agency stated that the Maintenance Manager had created a hostile environment and identified seven other incidents during a 4-month period in which the manager reportedly harassed, intimidated, cursed at and threatened other agency employees and supervisors. *Id.* at 2. The administrative judge found that the Maintenance Manager was not a similarly-situated comparator because: (1) the appellant was not a manager; (2) the Maintenance Manager allegedly "made certain comments to several employees;" and (3) the Maintenance Manager, unlike the appellant, did not allegedly travel "to a different location after requesting time off in the form of sick leave, to curse at a station manager and supervisors in a closed office." ID at 17.

¶12 As a preliminary matter, we find that the record supports the appellant's claim that he requested sick leave to attend the doctor's appointment he had on the day of the incident. PFR File, Tab 2 at 1; IAF, Tab 14, Subtab F. Thus, to the extent that the administrative judge found that the appellant requested sick leave to confront his wife's station manager, we reverse this finding. ID at 17. Moreover, we disagree with the administrative judge's finding that the Maintenance Manager was not similarly-situated to the appellant for the purpose of establishing disparate penalties. *Id.* The appellant and the Maintenance Manager worked at the same location, and the agency disciplined both of them for the same offense. IAF, Tab 14, Subtabs J, N. Nonetheless, the record reflects that the agency only issued a Letter of Warning to the Maintenance Manager for multiple incidents of unacceptable conduct. *Id.*, Subtab N. In contrast, the agency removed the appellant for a single incident of unacceptable conduct. *Id.*, Subtab J.

¶13 In *Boucher*, the Board found that the alleged comparator in that case was similarly-situated to Boucher, although the comparator committed his misconduct several years before Boucher's misconduct at a different location, and the alleged

comparator's misconduct was more serious than Boucher's misconduct. *See Boucher*, 118 M.S.P.R. 640, ¶ 22. Similarly, in this case, the Maintenance Manager's unacceptable conduct was arguably more serious than the appellant's unacceptable conduct, because the Maintenance Manager was a supervisory employee and his misconduct involved multiple incidents over the course of several months. *Compare* IAF, Tab 14, Subtab I at 1-2, *with id.*, Subtab N at 1-2. The Board has held that if an appellant could show that supervisory employees—who are held to a higher standard—were treated less harshly by the agency than the agency treated the appellant for similar misconduct, then the appellant would have met his disparate penalty burden and triggered the agency's burden to explain the difference in treatment. *Figueroa v. Department of Homeland Security*, 119 M.S.P.R. 422, ¶ 11 (2013) (citations omitted). The appellant has made that initial showing here.

¶14 Based on our review of the record, however, we find that the agency met its burden of proving that it had a legitimate reason for the difference in treatment between these employees. *See Boucher*, 118 M.S.P.R. 640, ¶ 24. The agency provided evidence that the appellant's unacceptable conduct, unlike that of the Maintenance Manager, placed employees in fear for their safety. *Compare* IAF, Tab 14, Subtab E at 39-44 of 87, Subtab I at 1-2, *with id.*, Subtabs N-O; *see also* Hearing CD (HDC) (testimony of Mr. Keys, Mr. Compton, and Ms. Smith). Moreover, the agency specified that the appellant's unacceptable conduct violated the agency's zero tolerance policy, unlike that of the Maintenance Manager. *See* IAF, Tab 14, Subtab I at 2. Another significant distinction is that the Maintenance Manager had approximately 29 years of service with the agency, in

contrast to the appellant's 6 years of service.[3] IAF, Tab 14, Subtab L at 39 of 81, Subtab O at 1.

¶15 Moreover, an agency is not foreclosed from proffering evidence that the penalty for a certain offense was too lenient in the past. *See Boucher*, 118 M.S.P.R. 640, ¶ 27. The deciding official credibly testified that he considered whether the appellant's penalty was consistent with penalties imposed on others for similar offenses in his penalty determination, and that he was unaware of any similarly-situated individuals. HCD (testimony of Mr. Almendarez). In explaining why the removal penalty was appropriate in the appellant's case, considering his lack of prior discipline and years of service, the deciding official testified that he decided against imposing a lesser penalty because he was not convinced that the appellant would not engage in the same serious misconduct with his own supervisors in the future. *Id.* The deciding official further testified that he was unfamiliar with the Maintenance Manager or the circumstances of his discipline, but that he would have removed the Maintenance Manager if he had been the deciding official in that case. *Id.*

¶16 We find that the deciding official considered the consistency of the penalty as required by *Douglas*, and that preponderant evidence justifies the difference in treatment between the appellant and the Maintenance Manager for their unacceptable conduct. Removal is within the range of penalties for unacceptable conduct in violation of the agency's zero tolerance policy,[4] IAF, Tab 14,

---

[3] The Maintenance Manager and the appellant are both preference eligible veterans. IAF, Tab 14, Subtab L at 39 of 81, Subtab O at 1.

[4] The Board has held that a removal imposed under a zero tolerance policy is not entitled to deference if the agency fails to give bona fide consideration to the appropriate *Douglas* factors, *see Cunningham v. U.S. Postal Service*, 112 M.S.P.R. 457, ¶ 6 (2009). However, because we find that the deciding official in this case properly considered the relevant *Douglas* factors, the agency's penalty determination is entitled to deference.

Subtab H, and the appellant's 6 years of service and lack of prior disciplinary history does not outweigh the seriousness of his offense. An employee's verbal threat to a supervisor is without question a serious offense. *See Robinson v. U.S. Postal Service*, 30 M.S.P.R. 678, 679 (1986) (sustaining the removal of an appellant who threatened a supervisor, despite the appellant's lack of prior discipline and 4 years of service), *aff'd*, 809 F.2d 792 (Fed. Cir. 1986) (Table). Such behavior affects the agency's obligation to maintain a safe work place for its employees, thus impinging upon the efficiency of the service. *Id.*

¶17 In sum, we find that the deciding official properly considered the relevant *Douglas* factors, and the penalty of removal was reasonable under the circumstances of this case.

ORDER

¶18 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of

prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

FOR THE BOARD:

_____

William D. Spencer
Clerk of the Board
Washington, D.C.